Filed 12/24/18 Natural Resources etc. v. State Water Resources etc. CA2/5

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

NATURAL RESOURCES DEFENSE COUNCIL et al., Plaintiffs and Appellants, v. STATE WATER RESOURCES CONTROL BOARD et al., Defendants and Respondents; COUNTY OF LOS ANGELES et al., Interveners and Respondents.	B282016 (Los Angeles County Super. Ct. No. BS156962)

APPEAL from a judgment of the Superior Court of Los Angeles County, Amy D. Hogue, Judge. Affirmed in part, reversed in part, and remanded with directions.

Jaclyn H. Prange and Steven E. Fleischli for Plaintiff and Appellant Natural Resources Defense Council.

Lawyers for Clean Water, Inc., Cooper & Lewand-Martin and Daniel Cooper for Plaintiff and Appellant Los Angeles Waterkeeper.

Xavier Becerra, Attorney General, Robert W. Byrne, Assistant Attorney General, Gary E. Tavetian, Jennifer Kalnins Temple, Deputy Attorneys General, for Defendants and Respondents.

Mary C. Wickham, County Counsel, Robert C. Cartwright, Assistant County Counsel, Lillian Salinger, Deputy County Counsel; Egoscue Law Group, Tracy J. Egoscue, Tarren A. Torres; Burhenn & Gest, Howard Gest and David W. Burhenn, for Interveners and Respondents County of Los Angeles and Los Angeles County Flood Control Districts.

No appearance for Interveners and Respondents Cities of Agoura Hills, Artesia, Beverly Hills, Commerce, Covina, Culver City, Downey, Hidden Hills, Inglewood, La Mirada, Manhattan Beach, Monrovia, Norwalk, Rancho Palos Verdes, Redondo Beach, San Marino, South El Monte, Torrance, Vernon, and Westlake Village.

I. INTRODUCTION

Plaintiffs and appellants Natural Resources Defense Council, Inc. and Los Angeles Waterkeeper (plaintiffs) filed a petition for writ of administrative mandamus against the State Water Resources Control Board (State Board) and the California Regional Water Quality Control Board, Los Angeles Region

(Regional Board) (defendants) seeking an order setting aside the 2012 Los Angeles County Municipal Separate Storm Sewer System (Los Angeles County MS4[1]) permit (2012 Permit), a National Pollutant Discharge Elimination System (NPDES)[2]

---

[1] An MS4 is "a conveyance or system of conveyances (including roads with drainage systems, municipal streets, catch basins, curbs, gutters, ditches, man-made channels, or storm drains):

"(i) Owned or operated by a State, city, town, borough, county, parish, district, association, or other public body (created by or pursuant to State law) having jurisdiction over disposal of sewage, industrial wastes, storm water, or other wastes, including special districts under State law such as a sewer district, flood control district or drainage district, or similar entity, or an Indian tribe or an authorized Indian tribal organization, or a designated and approved management agency under section 208 of the [Clean Water Act] that discharges to waters of the United States;

"(ii) Designed or used for collecting or conveying storm water;

"(iii) Which is not a combined sewer; and

"(iv) Which is not part of a Publicly Owned Treatment Works (POTW) as defined at 40 CFR 122.2." (40 C.F.R. § 122.26(b)(8).)

[2] The Clean Water Act (33 U.S.C. § 1251 et seq. (all statutory citations to the United States Code are to Title 33)) prohibits the discharge of any pollutant by any person except as authorized by specified sections of the act. (§ 1311(a); *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation, Inc.* (1987) 484 U.S. 49, 52 [108 S.Ct. 376, 379, 98 L.Ed.2d 306] (*Gwaltney*).) One such specified section is section 1342, which established the NPDES. (§ 1311(a); *Gwaltney, supra,* 484 U.S. at p. 52.) Pursuant to section 1342, the Administrator of the Environmental Protection

permit that regulates MS4 discharges of storm water and urban runoff. Plaintiffs contended that the watershed management programs (WMPs) and enhanced watershed management programs (EWMPs) in the 2012 Permit, pursuant to which permittees may be considered to be in compliance with the receiving water limitations[3] provisions in the permit, were "safe harbors" that violated the anti-backslide and anti-degradation provisions in the federal Clean Water Act and the state Porter-Cologne Water Quality Control Act (Porter-Cologne Act) (Wat. Code, § 13000 et seq.). The County of Los Angeles and the Los Angeles County Flood Control District filed a complaint in intervention; 20 cities,[4] permittees under the 2012 Permit, also filed a complaint in intervention. The trial court denied the petition for writ of administrative mandamus and plaintiffs appeal. We affirm the trial court's anti-backsliding ruling,

---

Agency (EPA) or states, when authorized by the Administrator, may issue NPDES permits that allow for the discharge of pollutants into waters subject to certain requirements. (§ 1342(a)(1); *Gwaltney, supra,* 484 U.S. at p. 52.)

[3] The receiving water limitations specify that storm water and non-storm water discharges must not cause or contribute to exceedances of water quality standards in waters that receive those discharges.

[4] Agoura Hills, Artesia, Beverly Hills, Commerce, Covina, Culver City, Downey, Hidden Hills, Inglewood, La Mirada, Manhattan Beach, Monrovia, Norwalk, Rancho Palos Verdes, Redondo Beach, San Marino, South El Monte, Torrance, Vernon, and Westlake Village.

reverse its anti-degradation ruling, and remand the matter to the trial court with directions as set forth below.[5]

II. BACKGROUND

In 1915, the California Legislature enacted the Los Angeles County Flood Control Act. Its purpose was to provide for the control and conservation of flood, storm, and other waste waters within the flood control district. In the ensuing decades, as Los Angeles grew rapidly and acres of undeveloped land were paved or otherwise developed, storm water that once would have been absorbed by the ground flowed into the region's rivers and creeks. When those waterways could not contain the increased water flow, extensive flooding resulted. To address the flooding, the U.S. Army Corps of Engineers lined the Los Angeles River and Ballona Creek with concrete and began to build an underground urban drainage system. As Los Angeles continued its expansion, that drainage system also expanded, ultimately developing into today's Los Angeles County MS4.

The Los Angeles County MS4 consists of about 120,000 catch basins, over 2,800 miles of underground pipes, and 500 miles of open channels. On an average dry day, about 100 million gallons of urban runoff flow through the Los Angeles County

---

[5] We deny plaintiffs' motion to take judicial notice of copies of excerpts from Los Angeles County Stormwater Monitoring Reports from 2011-2015; a copy of the trial court's January 23, 2017, tentative order denying the petition for writ of administrative mandamus in this action; and a copy of the certified transcript of the October 13, 2016, audiotaped hearing of the Ninth Circuit Court of Appeals Case No. 15-55562, *NRDC v. County of Los Angeles*, dated October 27, 2016.

MS4. On rainy days, water flow through the channels can be as much as 10 billion gallons. Before reaching the Los Angeles County MS4, these waters flow over streets, parking lots, and other developed areas picking up "pesticides, fertilizers, fecal indicator bacteria and associated pathogens, trash, automotive byproducts, and many other toxic substances generated by activities in the urban environment." The waters, carrying these untreated pollutants, then flow through the MS4 directly into the receiving waters of the region.

To address the pollution of regional waters, the Regional Board, in accordance with the Clean Water Act and the Porter-Cologne Act, issued the 2012 Permit. The permit regulates discharge from MS4s operated by the County of Los Angeles, the Los Angeles County Flood Control District, and 84 municipal permittees in a drainage area encompassing more than 3,000 square miles and multiple watersheds.

The 2012 Permit superseded the 2001 Los Angeles County MS4 permit (2001 Permit). Under the 2012 Permit, permittees had to comply with new water-quality-based requirements to implement 33 watershed-based total maximum daily loads (TDMLs).[6] The 2012 Permit also incorporated most of the

---

[6] To achieve water quality standards, the Clean Water Act imposes "effluent limitations." (§§ 1311(b)(1)(A), 1311(b)(1)(B).) An "effluent limitation" is a restriction on pollutants discharged into certain waters. (§ 1362(11).) States are required to identify waters within their boundaries for which the effluent limitations in sections 1311(b)(1)(A) and 1311(b)(1)(B) are not stringent enough to implement the water quality standard applicable to those waters. (§ 1313(d)(1)(A).) Such waters are called "impaired waters." (*City of Kennett, Missouri v. Environmental Protection Agency* (8th Cir. 2018) 887 F.3d 424, 427 (*City of Kennett*).) For

requirements in the 2001 Permit, including the receiving water limitations provisions that require that storm water discharges not cause or contribute to exceedances of water quality standards in the waters that receive those discharges. The 2012 Permit added provisions that allowed permittees to develop and implement WMPs and EWMPs in lieu of complying with the receiving water limitations provisions.

A WMP is a compliance program that allows permittees the flexibility to implement the requirements of the 2012 Permit on a watershed scale using customized strategies, control measures, and best management practices. An EWMP is a WMP that, subject to certain requirements, "comprehensively evaluates opportunities, within the participating Permittees' collective jurisdictional area in a Watershed Management Area, for collaboration among Permittees and other partners on multi-benefit regional projects that, wherever feasible, retain (i) all non-storm water runoff and (ii) all storm water runoff from the 85th percentile, 24-hour storm event for the drainage areas tributary to the projects, while also achieving other benefits including flood control and water supply, among others."[7]

---

impaired waters, states are required to establish TMDLs for certain pollutants. (§ 1313(d)(1)(C).) TMDLs calculate the impaired water's "loading capacity"—that is, the greatest amount of a pollutant that can be discharged into the water without violating water quality standards. (*City of Kennett, supra,* 887 F.3d at p. 428.)

[7] The WMP/EWMP compliance provisions are located in the 2012 Permit at Part VI.C.2.b. and d.

Part VI.C.2.b. provides: "A Permittee's full compliance with all requirements and dates for their achievement in an

Plaintiffs and others appealed from the Regional Board's issuance of the 2012 Permit. In its petition for review before the State Board, plaintiffs challenged, among other things, the inclusion of the WMP and EWMP provisions which they characterized as "safe harbors" that excused compliance with the 2012 Permit's receiving water limitations provisions in violation of federal anti-backsliding provisions in section 1342(o) and 40 C.F.R. section 122.44(l) and state and federal anti-degradation

---

approved Watershed Management Program or EWMP shall constitute a Permittee's compliance with the receiving water limitations provisions in Part V.A. of this Order for the specific water body-pollutant combinations addressed by an approved Watershed Management Program or EWMP."

Part VI.C.2.d. provides: "Upon notification of a Permittee's intent to develop a WMP or EWMP and prior to approval of its WMP or EWMP, a Permittee's full compliance with all of the following requirements shall constitute a Permittee's compliance with the receiving water limitations provisions in Part V.A. not otherwise addressed by a TMDL, if all the following requirements are met:

"i. Provides timely notice of its intent to develop a WMP or EWMP,

"ii. Meets all interim and final deadlines for development of a WMP or EWMP,

"iii. For the area to be covered by the WMP or EWMP, targets implementation of watershed control measures in its existing storm water management program, including watershed control measures to eliminate non-storm water discharges of pollutants through the MS4 to receiving waters, to address known contributions of pollutants from MS4 discharges that cause or contribute to exceedances of receiving water limitations, and

"iv. Receives final approval of its WMP or EWMP within 28 or 40 months, respectively."

provisions in State Water Board Resolution No. 68-16, "Statement of Policy with Respect to Maintaining High Quality Waters in California," (Resolution No. 68-16) and 40 C.F.R. section 131.12(a)(1). With revisions to the Fact Sheet in the 2012 Permit, the State Board upheld the WMP and EWMP provisions in the 2012 Permit, finding they did not violate either anti-backsliding or anti-degradation prohibitions.

Plaintiffs filed a verified petition for writ of administrative mandamus, challenging the State Board's decision. The trial court denied the petition, ruling that the 2012 Permit did not violate anti-backsliding or anti-degradation prohibitions. In support of its ruling, it found "[t]he 2012 Permit mark[ed] a sea change in [the Regional Board's] approach to compliance with the Clean Water Act. . . . Whereas the prior NPDES permit (the '2001 Permit') was structured to enforce water quality standards, the 2012 Permit create[d] incentives for municipalities to construct infrastructure improvements designed to retain polluted storm water *in situ* rather than piping it via sewer system to the regions' various water bodies."

III. DISCUSSION

A. *Standard of Review*

Although the "'interpretation of a statute or regulation is ultimately a question of law, we must . . . defer to an administrative agency's interpretation of a statute or regulation involving its area of expertise, unless the interpretation flies in the face of the clear language and purpose of the interpreted provision. [Citations.]' [Citation.]" (*Communities for a Better*

Environment v. State Water Resources Control Bd. (2005) 132 Cal.App.4th 1313, 1330.) We extend such deference, however, "only where the administrative agency has an interpretive advantage over the court because of the scientific and technical nature of the issues." (*Asociacion de Gente Unida por el Agua v. Central Valley Regional Water Quality Control Bd.* (2012) 210 Cal.App.4th 1255, 1268 (*Asociacion de Gente Unida por el Agua).*)

A trial court exercises its "independent judgment" to determine if the State Board's factual findings are supported by the weight of the evidence. (Wat. Code, § 13330, subd. (e).) "In exercising its independent judgment, a trial court must afford a strong presumption of correctness concerning the administrative findings, and the party challenging the administrative decision bears the burden of convincing the court that the administrative findings are contrary to the weight of the evidence." (*Fukuda v. City of Angels* (1999) 20 Cal.4th 805, 817.) "Even when, as here, the trial court is required to review an administrative decision under the independent judgment standard of review, the standard of review on appeal of the trial court's determination is the substantial evidence test. [Citation.]" (*Id.* at p. 824.)

B. *The 2012 Permit Does Not Violate The Anti-Backsliding Provisions in the Clean Water Act*

Plaintiffs contend that the 2012 Permit violates the statutory and regulatory anti-backsliding provisions in the Clean Water Act because the WMP and EWMP provisions allow permittees to delay compliance with water quality standards thus making the 2012 Permit less stringent than the 2001 Permit. We

disagree because the Clean Water Act's anti-backsliding provisions do not apply to municipal storm water discharge.

1. Section 1342(o)—the statutory anti-backsliding provision

As explained above, the Clean Water Act prohibits the discharge of pollutants except as authorized by specified sections of the act. The authorizing section at issue here is section 1342, which established the NPDES pursuant to which the Regional Board issued the 2012 Permit that governs the discharge of municipal stormwater by the Los Angeles County MS4.

The statutory anti-backsliding provision in the Clean Water Act is found in section 1342(o)(1) which provides in relevant part: "In the case of *effluent limitations* established on the basis of section 1311(b)(1)(C) . . . of this title, a permit may not be renewed, reissued, or modified to contain effluent limitations which are less stringent than the comparable effluent limitations in the previous permit except in compliance with section 1313(d)(4) of this title." (§ 1342(o)(1), italics added.)

Section 1342(p)(3)(B)(iii) sets forth the Clean Water Act requirements for municipal storm water discharges. It provides: "Permits for discharges from municipal storm sewers—[¶] . . . [¶] shall require controls to reduce the discharge of pollutants to the maximum extent practicable, including management practices, control techniques and system, design and engineering methods, and such other provisions as the Administrator or the State determines appropriate for the control of such pollutants."

Relying on the language of section 1342(p)(3)(B)(iii), which does not reference "effluent limitations," and *Defenders of*

Wildlife v. Browner (9th Cir. 1999) 191 F.3d 1159 (*Defenders of Wildlife*), the trial court ruled that the anti-backsliding provision in section 1342(o)(1) does not apply to permits issued to municipalities for storm water discharge. We agree and hold that the anti-backsliding provision in section 1342(o) does not apply to municipal storm water discharges.

In *Defenders of Wildlife, supra,* 191 F.3d 1159, the court considered whether municipalities are required to comply strictly with state water quality standards under section 1311(b)(1)(C). (*Defenders of Wildlife, supra,* 191 F.3d at p. 1164.) It compared the *industrial* storm water discharge provision in section 1342(p)(3)(A),[8] which expressly mandates compliance with the applicable effluent limitations in section 1311 and the *municipal* storm water discharge provision in section 1342(p)(3)(B)(iii), which contains no reference to section 1311. Reading the two sections together, it concluded that Congress chose to require industrial storm water discharges to comply with section 1311, but not to include the same requirement for municipal storm water discharges. (*Defenders of Wildlife, supra,* 191 F.3d at p. 1165.)

Plaintiffs argue the anti-backsliding provision in section 1342(o) applies to the 2012 Permit because the 2001 Permit contained "effluent limitations" that were established on the basis of section 1311(b)(1)(C). Under the Clean Water Act, an "effluent limitation" is "any restriction established by a State or the Administrator on quantities, rates, and concentrations of chemical, physical, biological, and other constituents which are

---

[8] Section 1342(p)(3)(A) provides: "Permits for discharges associated with industrial activity shall meet all applicable provisions of this section and section 1311 of this title."

discharged from point sources into navigable waters, the waters of the contiguous zone, or the ocean, including schedules of compliance." (§ 1362(11).) Plaintiffs contend the 2001 Permit's "Discharge Prohibition," which prohibited permittees from causing or contributing to violations of water quality standards, was an "effluent limitation" under section 1362(11). They reason that because the "Discharge Prohibition" restricted the amount of pollution in the permittees' discharge by prohibiting any levels of pollution that exceeded water quality standards, it was a "restriction" on the "quantities" of pollution that are "discharged" from the Los Angeles County MS4—i.e., it was an effluent limitation.

The "Discharge Prohibition" to which plaintiffs refer is actually the "Receiving Water Limitations" in the respective permits. As distinct parts of the 2012 Permit, "effluent limitations" and "receiving water limitations" are different standards. As set forth above, "effluent limitations" are restrictions on "quantities, rates, and concentrations of chemical, physical, biological, and other constituents which are discharged from point sources" into waters. (§ 1362(11).) Receiving water limitations concern the quality of the receiving water, i.e., the water into which effluents are discharged.[9]

---

[9] Having determined that the receiving water limitations were not an effluent limitation, we need not address plaintiffs' contention that they were "established on the basis of section 1311(b)(1)(C)."

2. 40 C.F.R. Section 122.44(l)—the regulatory anti-backsliding provision

The relevant regulatory anti-backsliding provision in the Clean Water Act is found in 40 C.F.R. section 122.44(l)(1) which provides in relevant part: "[W]hen a permit is renewed or reissued, interim effluent limitations, standards or conditions must be at least as stringent as the final effluent limitations, standards, or conditions in the previous permit (unless the circumstances on which the previous permit was based have materially and substantially changed since the time the permit was issued and would constitute cause for permit modification or revocation and reissuance under § 122.62.)"

Plaintiffs contend that 40 C.F.R. section 122.44(l)(1), by its plain language, applies to all permits. They argue the regulation "is not limited to 'effluent limitations'—it applies to 'standards' and 'conditions' as well." The EPA Appeals Board has explicitly stated that 40 C.F.R. section 122.44(l) does not apply to "water quality-based permits." (*In the Matter of: City & County of San Francisco*, 4 E.A.D. 559, 580, fn. 49 (NPDES Appeal No. 91-1809), 1993 WL 118290 (*City & County of San Francisco*) ["to date EPA has not implemented . . . the statutory prohibition against backsliding from water quality-based permits"]; see Ryan, The Clean Water Handbook (4th ed. 2018) NPDES Permit Application and Issuance Procedures, p. 92 ["EPA's regulations prohibiting backsliding have not yet been modified to incorporate this prohibition against backsliding from water-quality-based permit limits"].) It further stated that the statutory anti-backsliding provisions in section 1342(o) take precedence over the EPA's regulation in 40 C.F.R. section 122.44(l)(1). (*City & County of*

San Francisco, supra, 4 E.A.D. at p. 580, fn. 49.) Thus, states "must now apply the statute itself, instead of these regulations, when questions arise regarding backsliding from limitations based on . . . water quality standards." (*Ibid.*) Accordingly, 40 C.F.R. section 122.44(l) does not apply to the 2012 Permit.

Because we hold that the anti-backsliding provisions in section 1342(o) and 40 C.F.R. section 122.44(l) do not apply to the 2012 Permit, we need not consider plaintiffs' claims that the permit does not qualify for an exception to those anti-backsliding provisions or that the 2012 Permit backslides.

C. *The 2012 Permit's Compliance With Federal and State Anti-Degradation Policies*

Plaintiffs contend that the 2012 Permit fails to comply with federal and state anti-degradation policies. According to plaintiffs, defendants failed to conduct a complete anti-degradation analysis; the trial court applied an incorrect standard of review to the State Board's factual findings on the degradation of high quality waters; the State Board's factual findings were inadequate to justify the degradation of high quality waters; and the WMP and EWMP provisions in the permit allow impermissible degradation of impaired waters. Because the trial court applied the wrong standard of review, we reverse.

1. The anti-degradation policies

Federal regulation 40 C.F.R. section 131.12(a) requires states to develop and adopt a statewide anti-degradation policy to

ensure that "[e]xisting instream water uses and the level of water quality necessary to protect [those] uses [are] maintained and protected." In 1968, the State Board, in Resolution No. 68-16, stated that it is the policy of the state to regulate the granting of permits for the disposal of wastes into the waters of the state so "as to achieve the 'highest water quality consistent with maximum benefit to the people of the State.'" *(Asociacion de Gente Unida por el Agua, supra,* 210 Cal.App.4th at pp. 1261-1262.) "High quality water" is the best water quality achieved since the State Board adopted the anti-degradation policy in 1968. (*Id.* at p. 1259.)

2. Implementation of the anti-degradation policies

In 1990, the State Board issued Administrative Procedures Update No. 90-004 (APU No. 90-004) to provide guidance to Regional Boards for implementing the anti-degradation policies in 40 C.F.R. section 131.12 and Resolution No. 68-16. It provides that "if the Regional Board has no reason to believe that existing water quality will be reduced due to the proposed action, no anti[-]degradation analysis is required."

If the Regional Board believes a proposed action "will result in a significant increase in pollutant loadings," it must perform a "complete" anti-degradation analysis. If, however, one of a number of specific circumstances applies, the Regional Board may forego a complete analysis and perform a "simple" anti-degradation analysis. Among the specific circumstances that justify a simple analysis is a Regional Board's determination that "the reduction in water quality is temporally limited and will not

result in any long-term deleterious effects on water quality; e.g., will cease after a storm event is over."

3. Simple anti-degradation analysis

Plaintiffs contend the trial court erred in finding that a simple anti-degradation analysis was appropriate. The trial court applied the simple analysis because it concluded that "'the reduction in water quality [was] temporally limited and [would] not result in any long-term deleterious effects on water quality.'" We review this factual finding for substantial evidence. (*Fukuda v. City of Angels*, *supra*, 20 Cal.4th at p. 824.)

The trial court noted that the 2012 Permit requires permittees who choose to implement a WMP or EWMP to conduct a Reasonable Assurance Analysis, using a quantitative peer-reviewed model, "to show that proposed WMPs or EWMPs will 'achieve applicable water quality based effluent limitations' and will not 'cause or contribute to exceedances of receiving water limitations.'" The court further noted that "once WMPs or EWMPs have been implemented, the 2012 Permit requires a comprehensive program evaluation every 2 years to ensure progress toward achieving effluent and receiving water limitations." Moreover, permittees who give notice to the Regional Board of their intent to develop a WMP or EWMP must complete the approval process within 28 months for a WMP and 40 months for an EWMP. Based on this record, we conclude the trial court's finding was supported by substantial evidence.

4. Independent judgment standard

Even when the simple anti-degradation analysis applies, a Regional Board must still decide whether the permit complies with anti-degradation policies. Plaintiffs contend that the trial court erred by applying the wrong standard of review when analyzing whether the 2012 Permit complies with anti-degradation policies. We agree.

Pursuant to Resolution No. 68-16, a permit complies with anti-degradation policies if the Regional Board makes certain findings. (*Asociacion de Gente Unida por el Agua, supra*, 210 Cal.App.4th at p. 1278.) "The State Board has described these findings as a two-step process. 'The first step is if a discharge will degrade high quality water, the discharge may be allowed if any change in water quality (1) will be consistent with maximum benefit to the people of the State, (2) will not unreasonably affect present and anticipated beneficial use of such water, and (3) will not result in water quality less than that prescribed in state policies (e.g. water quality objectives in Water Quality Control Plans). The second step is that any activities that result in discharges to such high quality waters are required to use the best practicable treatment or control of the discharge necessary to avoid a pollution or nuisance and to maintain the highest water quality consistent with the maximum benefit to the people of the State.' [Citation.]" (*Asociacion de Gente Unida por el Agua, supra*, 210 Cal.App.4th at p. 1278; Resolution No. 68-16.)

Here, the trial court concluded "the Regional Board's assertion that 'discharges permitted in [the 2012 Permit] are consistent with the anti[-]degradation provisions' is not without support." It then discussed the Regional Water Board's findings

and stated that it "accept[ed] these findings as sufficient to justify any degradation that may occur as a result of the 2012 Permit's regulatory scheme. As discussed, the weight of the evidence supports the Regional Board's assertion that 'discharges permitted in [the 2012 Permit] are consistent with the anti[-]degradation provisions.'"

In support of their contention that the trial court applied the wrong standard of review to this finding, plaintiffs rely on *Rodriguez v. City of Santa Cruz* (2014) 227 Cal.App.4th 1443 (*Rodriguez*). In *Rodriguez*, a police officer applied for industrial disability retirement. After a hearing, an administrative law judge concluded the officer was able to perform the requisite duties of his position based on the evidence presented and its determination that he lacked credibility. The officer filed a petition for writ of administrative mandamus to set aside his employer's determination. (*Id.* at pp. 1445-1450.)

The trial court heard the petition and took the matter under submission. (*Rodriguez, supra,* 227 Cal.App.4th at p. 1450.) In a statement of decision, the trial court "identified the standard of review as independent judgment review 'to determine whether the finding of the Administrative Law Judge is supported by the weight of the evidence.'" (*Ibid.*)

The trial court described medical reports it reviewed and concluded that "'[w]hile there appears to be no reasonable doubt that the Petitioner suffers from psychiatric disorders, there is sufficient evidence for the Administrative Law Judge to find that the Petitioner lacked credibility, based upon the fact that the Petitioner worked while allegedly disabled, and to conclude that he was not incapacitated from working as a Police Station Duty Officer.' The court went on to state that '[t]he weight of the

evidence . . . does not establish that the petitioner was substantially incapacitated from performing his duties of employment.'" (*Rodriguez, supra,* 227 Cal.App.4th at p. 1450.) The trial court denied the officer's petition for writ of administrative mandamus. (*Ibid.*)

On appeal, the parties agreed that the independent standard of review applied in the trial court, but disagreed whether that was the standard the trial court applied. (*Rodriguez, supra,* 227 Cal.App.4th at p. 1452.) The officer claimed the trial court did not independently assess his credibility, but instead deferred to the administrative law judge's finding. (*Ibid.*) In support of his argument, the officer relied in part on the trial court's statement that "'there is sufficient evidence for the Administrative Law Judge to find that the Petitioner lacked credibility, based upon the fact that the Petitioner worked while allegedly disabled, and to conclude that he was not incapacitated from working as a Police Station Duty Officer.'" (*Ibid.*) The officer argued the trial court's use of the phrase "sufficient evidence" showed it incorrectly applied the substantial evidence standard to affirm the administrative law judge's credibility determination. (*Ibid.*) In response, the officer's employer pointed out, among other things, that the trial court's statement of decision identified the correct independent judgment standard of review. (*Id.* at p. 1453.)

The Court of Appeal reversed the denial of the petition for writ of administrative mandamus. It reasoned, "[T]he statement of decision leaves us with the distinct impression that the trial court likely did not apply the independent judgment standard in making its decision, and particularly in assessing [the officer's] credibility. We reach that conclusion based on the fact that each

time the court referenced the correct independent judgment standard, it also incorrectly stated that the [administrative law judge's] decision was entitled to 'deference.'" (*Rodriguez, supra,* 227 Cal.App.4th at p. 1453.) Moreover, the court added, the trial court "articulated no independent finding regarding . . . evidence to support *the* [*Administrative Law Judge's*] *finding* that he lacked credibility." (*Ibid.*)

Here, although the trial court set forth in its ruling the correct independent judgment standard of review,[10] it nevertheless accepted the State Board's factual "findings as *sufficient* to justify any degradation that may occur as a result of the 2012 Permit's regulatory scheme." (Italics added.) The trial court also deferred to the Regional Board's factual findings in stating, "The Regional Board's assertion that 'discharges permitted in the [2012 permit] are consistent with the antidegradation provisions' is not without support." Taken together, these statements demonstrate that the trial court, rather than undertaking the required independent standard of review (Wat. Code, § 13330, subd. (e)), reviewed the State Water Board's findings for substantial evidence. Our conclusion is supported by the fact that the trial court "articulated no independent finding regarding" the State Board's justification for degradation. (See *Rodriguez, supra,* 227 Cal.App.4th at p. 1453.) Accordingly, we reverse the trial court's anti-degradation ruling and remand the matter to the trial court with directions to reconsider, under the independent judgment standard of review, plaintiffs' assertion in their petition for writ of administrative

---

10 The trial court also stated the correct standard at the hearing on the petition for writ of administrative mandamus.

mandamus that the 2012 Permit violates the federal and state anti-degradation policies.

Because we reverse the trial court's anti-degradation ruling based on our conclusion that the trial court applied an incorrect standard of review to the State Board's factual findings on degradation, we need not address plaintiffs' remaining contentions.

IV. DISPOSITION

The trial court's anti-backsliding ruling is affirmed, its anti-degradation ruling is reversed, and the matter is remanded to the trial court with directions to reconsider, under the independent judgment standard of review, plaintiffs' assertion in their petition for writ of administrative mandamus that the 2012 Permit violates the federal and state anti-degradation policies. The parties are to bear their own costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

KIM, J.

We concur:

BAKER, Acting P. J.

JASKOL, J. *

---

* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.